

FILE COPY

Office - Supreme Court, U.
FILED
APR 21 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term 1948

No. [REDACTED]

747

STANDARD BRANDS INCORPORATED and CAMP-
BELL SOUP COMPANY, Successor thereto and Inter-
vening Plaintiff,

Petitioners,

against

EASTERN SHORE CANNING COMPANY,
INCORPORATED,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE
FOURTH CIRCUIT**

ELLIS W. LEAVENWORTH,
Counsel for Petitioners.



INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT	1
Summary Statement of the Matter Involved	2
Jurisdiction	4
The Questions Presented	4
Reasons Relied on for the Allowance of the Writ ..	5
SUPPORTING BRIEF	7
Opinions of the Courts Below	7
Jurisdiction	7
Statement of the Case	7
Specification of Errors	8
ARGUMENT	10
I. The Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Second Circuit in <i>Standard Brands Inc. v. Smidler</i> , 151 F. (2d) 34	10
II. The Court of Appeals for the Fourth Circuit has decided three important questions under the Trade-Mark Act which have not been, but should be, settled by this Court	16
1. In deciding whether the accused mark is a "colorable imitation" of the mark alleged to be infringed, should the court take into consideration the accessories used with the accused mark such as the name of the defendant on the label and the appearance of the label as a whole?	17

	PAGE
2. Is there any basis in law or common knowledge for a finding that people familiar with the trademark alleged to be infringed have knowledge of the identity of the owner thereof and would not be confused by the accused mark unless they thought it indicated the goods of a party of that identity?	20
3. Is it significant that the defendant's kind of goods would not be mistaken for the plaintiff's kind of goods in a case where the goods of the parties are related but not identically the same?	23
CONCLUSION	25

Table of Cases

Aunt Jemima Mills Co. v. Rigney (C. A. 2) 247 Fed. 407	13
Bayer Co. v. United Drug Co., 272 Fed. 505	22
Beech-Nut Co. v. Lorillard Co., 273 U. S. 629	24
Champion Plug Co. v. Sanders, 331 U. S. 125	16
Coty v. Le Blume Import Co. (S. D. N. Y.) 292 Fed. 264	22
Dawes and Fanning (1872), 1 Official Gazette 27	22
Dennison Mfg. Co. v. Thomas Mfg. Co. (Del.) 94 Fed. 651	22
Gehl v. Hebe Co. (C. A. 7) 276 Fed. 271	18
Grove Laboratories v. Brewer & Co. (C. A. 1) 103 F. (2d) 175	19
Hanover Star Milling Co. v. Metcalf and Allen & Wheeler Co. v. Hanover Star Milling Co., 240 U. S. 403	10

	PAGE
La Touraine Coffee Co. v. Lorraine Coffee Co. (C. A. 2)	
157 F. (2d) 115	23
Mishawaka Mfg. Co. v. Kresge Co., 316 U. S. 203 . .	16, 25
N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.	
(C. A. 9) 102 Fed. 327	18
Powell v. Birmingham Vinegar Brew. Co., 66 L. J. Ch.	
763	21
Pro-phy-lac-tic Brush Co. v. Lawson (1937) 32 U. S.	
P. Q. 262	22
Reid Murdoch & Co. v. H. P. Coffee Co. (C. A. 8)	48
F. (2d) 817	18
Restatement of Torts, §729	18
Rice-Stix v. Industrial (C. C. P. A.) 152 F. (2d) 1011	18
Saalfeld Pub. Co. v. G. & C. Merriam Co. (C. A. 6)	238
Fed. 1	21
Shaver v. Heller & Merz Co. (C. A. 8) 108 Fed. 821 . .	22
Standard Brands Inc. v. Smidler, 151 F. (2d) 34 . .	5, 10, 19
Tillman & Bendel v. California Packing Corp. (C. A. 9)	
63 F. (2d) 498	18
35 Trade-Mark Reporter 103, Part I	15
Walter Baker & Co. v. Slack (C. A. 7) 130 Fed. 514 . .	21



IN THE
Supreme Court of the United States

October Term 1948

No.

STANDARD BRANDS INCORPORATED and CAMPBELL SOUP
COMPANY, Successor thereto and Intervening Plaintiff,
Petitioners,

against

EASTERN SHORE CANNING COMPANY, INCORPORATED,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE
FOURTH CIRCUIT**

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Your petitioners Standard Brands Incorporated and
Campbell Soup Company pray for a writ of certiorari to
the United States Court of Appeals for the Fourth Circuit
to review a final judgment of that court entered January
22, 1949 affirming a judgment of the District Court for the
Eastern District of Virginia (Judge Paul).

The opinion of the Court of Appeals is reported at
172 F. (2d) 144 and appears at page 38 of the record. The
District Court opinion (R. 20) has not been reported.

Summary Statement of the Matter Involved

Despite diversity jurisdiction, Standard Brands Incorporated, a Delaware corporation, brought this action specifically under the Trade-Mark Act of 1905 (Sections 16 *et seq.*, 15 U. S. C. §§96 *et seq.*) against Eastern Shore Canning Company, Incorporated, a Virginia corporation, charging infringement of the trademark V-8 for a vegetable juice cocktail by the unauthorized trademark use of VA on tomato juice and lima beans. The defendant is described as "a small Virginia corporation" in the answer (R. 7) and the opinion of the District Court (R. 21), and the plaintiff is described as "a corporation of nation wide fame" in the opinion of the Court of Appeals (R. 42). The complaint contains the usual allegation of unfair competition but no acts of unfair competition are specified excepting the alleged trademark infringement.

Standard Brands had agency offices in seven cities of Virginia. Its V-8 trademark had not only been registered under the federal Act of 1905 and nationally used and advertised, but had also been extensively used, advertised and registered in Virginia, before respondent made any VA trademark use.

Photographs of cans of the V-8 Vegetable Juice Cocktail (Exhibit B) and VA Tomato Juice (Exhibit H) are shown on the next two pages. These particular cans were physical exhibits before the courts below and are available for submission to this Court (R. 11, 13, 43).



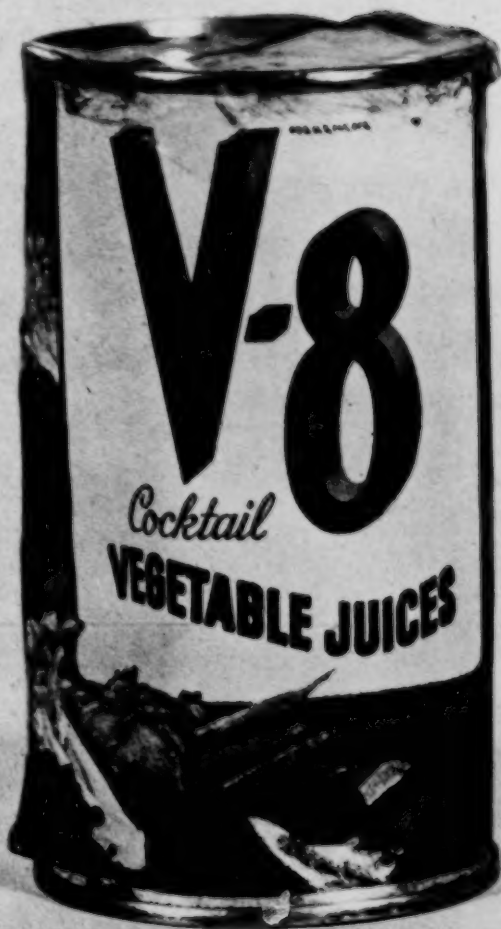


EXHIBIT B



EXHIBIT H



The case was tried upon a stipulation of facts and accompanying exhibits. There were no witnesses. The Court of Appeals, however, seems to have applied the rule (R. C. P. 52a) that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". The court held that the crucial question of likelihood of confusion "must be left to the determination of the trier of fact" (R. 42).

Although V-8 and VA are not unlike in appearance, and the courts below found them phonetically alike, and both are applied to tomato juice (although the V-8 product contains other vegetable juices which do not change the tomato juice color of it), the District Court held there was no likelihood of confusion and the Court of Appeals affirmed.

While the case was pending in the District Court, Campbell Soup Company, a New Jersey corporation, purchased the trademark V-8 from Standard Brands and was allowed to intervene.

The Trade-Mark Act of 1905 was repealed and supplanted by the Act of 1946 effective July 5, 1947 (15 U. S. C. §§1051-1127) which provided in section 46 (a) that "This Act * * * except as otherwise herein specifically provided shall not affect any suit * * * then pending" (15 U. S. C. §1051 note). It provided in section 46 (b), however, that registrations under the Act of 1905 "shall be subject to and shall be entitled to the benefits of the provisions of this Act to the same extent and with the same force and effect as though registered on the principal

register established by this Act except as limited" in sections not here involved (15 U. S. C. §1051 note).

Section 32 (1) of the Act of 1946 (15 U. S. C. §1114) codifies the case law construing sections 16 and 19 of the Act of 1905 (15 U. S. C. §§96, 99) in so far as they defined trademark infringement. The questions here presented involve the construction and enforcement of sections 16 and 19 of the Act of 1905 and 32 (1) of the Act of 1946.

Jurisdiction

The date of the judgment of the court below is January 22, 1949 (R. 43).

The jurisdiction of this Court is invoked under Sections 1254 (1) and 2101 of Title 28, and Section 1122 of Title 15, United States Code.

The Questions Presented

1. In deciding whether VA is a "colorable imitation" of V-8, should the court have taken into consideration the accessories used with VA such as the name of the defendant on the label and the appearance of the label as a whole?

2. Is there any basis in law or common knowledge for a finding that people familiar with the trademark V-8 have knowledge of the identity of the owner thereof and would not be confused by VA unless they thought it indicated the goods of a party of that identity?

3. Is it significant in this case that tomato juice or lima beans would not be mistaken for a vegetable juice cocktail?

4. Is the use of VA on tomato juice and lima beans in the manner and form shown on Exhibit H "likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods" (15 U. S. C. §1114) by causing purchasers to believe that such goods come from the same source as the V-8 Vegetable Juice Cocktail?

Reasons Relied on for the Allowance of the Writ

I. The Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Second Circuit in *Standard Brands Inc. v. Smidler*, 151 F. (2d) 34.

II. The Court of Appeals has decided three important questions under the Trade-Mark Act which have not been, but should be, settled by this Court:

1. In deciding whether the accused mark is a "colorable imitation" of the mark alleged to be infringed, should the court take into consideration the accessories used with the accused mark such as the name of the defendant on the label and the appearance of the label as a whole?

2. Is there any basis in law or common knowledge for a finding that people familiar with the trademark alleged to be infringed have knowledge of the identity of the owner thereof and would not be confused by the accused trademark unless they thought it indicated the goods of a party of that identity?

3. Is it significant that the defendant's kind of goods would not be mistaken for the plaintiff's kind of goods in a case where the goods of the parties are related but not identically the same?

WHEREFORE your petitioners respectfully pray that a writ of certiorari may issue to the United States Court of Appeals for the Fourth Circuit commanding the said court to certify and send to this Court a full and complete transcript of the record and all proceedings of the said court in the case numbered and entitled on its docket No. 5816, *Standard Brands Incorporated and Campbell Soup Company, Successor thereto and Intervening Plaintiff, Appellants, v. Eastern Shore Canning Company, Incorporated, Appellee*, to the end that this case may be reviewed and determined by this Court, that the judgment of said Court of Appeals herein may be reversed and that your petitioners may have such other and further relief as may be just.

April 19, 1949.

ELLIS W. LEAVENWORTH,
Counsel for Petitioners.

IN THE
Supreme Court of the United States

October Term 1948

No.

STANDARD BRANDS INCORPORATED and CAMPBELL SOUP
COMPANY, Successor thereto and Intervening Plaintiff,
Petitioners,

against

EASTERN SHORE CANNING COMPANY, INCORPORATED,
Respondent.

SUPPORTING BRIEF

Opinions of the Courts Below

The District Court's opinion (R. pp. 20-30) is not reported. The opinion of the Court of Appeals (R. pp. 38-42) is reported 172 F. (2d) 144, and 80 U. S. P. Q. 318.

Jurisdiction

The date of the judgment of the court below is January 22, 1949 (R. 43) and the grounds on which jurisdiction is invoked are stated in the petition at page 4.

Statement of the Case

The essential facts are stated in the petition at page 2.

Specification of Errors

The Court of Appeals for the Fourth Circuit erred:

1. In deciding the case upon the basis of a comparison of the labels instead of the trademarks of the parties.

2. In resorting to one of the accessories used on the VA label, to wit, the name of the respondent, in order to find that VA is a geographical term and indicates territorial origin and not commercial origin.

3. In concluding that accessories used by the respondent in connection with the VA, such as the design and colors of the VA labels and the name of the respondent, are relevant and material in this case; and in failing to conclude that they are not relevant or material.

4. In finding that VA is customarily used as an abbreviation of the name of the state of Virginia, and in failing to find that VA is customarily used as an abbreviation of the name Veterans' Administration.

5. In failing to make any finding whatsoever with respect to the impression likely to be conveyed to prospective purchasers by the VA, in and of itself, when used in the manner and form in which it is used on the VA labels.

6. In failing to find that the VA is used on respondent's labels in the manner and form of a trademark and is likely to convey to prospective purchasers the impression that it indicates commercial origin and not geographical origin.

7. In finding that the VA on respondent's label would be understood as indicating a Virginia product "rather

than the goods of a corporation of nation wide fame", and in thereby finding in effect that people familiar with the trademark V-8 have knowledge of the identity of the owner thereof and will not be confused by VA unless they think it indicates the goods of a party of that identity.

8. In concluding that it is material that there would be no confusion of goods as distinguished from confusion of source, and in failing to conclude that the lack of confusion of goods is immaterial in a case such as this where the complaint is based on alleged confusion of source without confusion of goods.

9. In concluding that the crucial question of likelihood of confusion "must be left to the determination of the trier of fact", although there were no witnesses and the Court of Appeals was under no duty to give due regard to the opportunity of the trial court to judge of the credibility of witnesses.

10. In concluding that close phonetic similarity is not sufficient in itself to cause confusing similarity of trademarks.

11. In failing to make any finding as to the visual similarity between VA and V-8.

12. In failing to find that VA and V-8 are similar in appearance and that the total of the similarities in sound and appearance is sufficient to be likely to cause confusion.

13. In failing to find that tomato juice, lima beans and a vegetable juice cocktail are so closely associated in the minds of purchasers of such products that they are likely

to be regarded as coming from the same source if sold under confusingly similar trademarks.

14. In failing to find that VA Tomato Juice and VA Lima Beans are likely to be regarded as coming from the same source as the V-8 Vegetable Juice Cocktail.

15. In affirming the judgment of the District Court.

ARGUMENT

The points of the argument are stated in the petition at page 5 as reasons relied on for the allowance of the writ.

I. The Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Second Circuit in *Standard Brands Inc. v. Smidler*, 151 F. (2d) 34.

The two decisions are in conflict on the question of the extent of the V-8 trademark rights with reference to the kind of goods. The situation is similar to that presented in *Hanover Star Milling Co. v. Metcalf* and *Allen & Wheeler Co. v. Hanover Star Milling Co.*, 240 U. S. 403, where certiorari was granted to the Court of Appeals for the Fifth Circuit and the Court of Appeals for the Seventh Circuit because "These courts differed upon fundamental questions" (p. 408) and "Interesting and important questions are raised concerning the territorial extent of trade-mark rights" (p. 411). The trademark TEA ROSE was involved in both cases.

The question of the extent of trademark rights with reference to the kind of goods would seem to be even more fundamental and important than the question of their extent territorially because it relates to the scope of the substantive rights in all territories. The Second Circuit held that the V-8 trademark rights extend to such products as a manufacturer of food might reasonably be expected to manufacture, and that such products include vitamin tablets (151 F. (2d) 34, 36, 37):

“The defendant’s dry vitamin tablets are very different in appearance and however marked could not be mistaken by anyone for liquid vegetable juice, but that fact is a colorless one. * * * They are eaten with food and are widely represented to supplement it by the addition of properties essential to health in which the diet of the user may be deficient for one reason or another. It might reasonably be expected that a manufacturer or distributor of food would also make or distribute vitamin tablets. Indeed, it does appear, as already noted, that this plaintiff produces and distributes dry vitamin tablets under the mark ‘Stams’.”

The Fourth Circuit held, however, that the V-8 trademark rights do not extend to tomato juice and lima beans because those products could not be mistaken for vegetable juices (R. 42):

“It is significant * * * that V-8, as used by the plaintiff, has become associated in the public mind with a specific combination of vegetable juices; that defendant does not manufacture this product and has used its accused mark only on products which no one would mistake for the combination * * *.”

The Fourth Circuit *stated* the law of the *Smidler* case (and the established federal law on the subject) as follows (R. 42):

“And it is also well established that the protection which the law gives to the owner of a trade-mark is not confined to the goods upon which it has been used by the owner, but extends to products which would be reasonably thought by the buying public to come from the same source if sold under a similar mark. *Standard Brands Inc. v. Smidler*, 2 Cir., 151 F. 2d 34, 36; *Restatement of Torts*, §728, Comment c, §730.”

But having stated the law, the Fourth Circuit not only failed to apply it but took from the discussion of another point in the *Smidler* opinion (whether V-8 is a valid trade-mark) the thought that V-8 “has become associated in the public mind with a specific combination of vegetable juices” and misapplied it in support of the statement quoted *supra* that it is significant that no one would mistake the products of the defendant for vegetable juices. The phrase “associated in the public mind” was used by the Second Circuit in a discussion of the validity of the trademark V-8 (not here involved) which is quoted in part by the Fourth Circuit (R. 39) and continues as follows (151 F. (2d) 34, 36):

“Except for this association, we think, no one could reasonably be expected to know that ‘V-8’ designated a vegetable juice cocktail, or any other particular thing for that matter, unless it be something so described by both shape and number, like an eight cylinder automobile engine, for instance, having cylinder blocks set at an acute angle to each other.”

" The facts relating to the extent of the V-8 trademark rights with reference to the kind of goods in these two cases are facts to which the same law is applicable and should have been applied. The goods of the defendants in the two cases are not the same but in the *Smidler* case the defendant's goods were not so closely associated with the plaintiff's goods as in this case where not only are the goods of both parties food products but defendant's tomato juice resembles plaintiff's vegetable juices in appearance as the court below found (R. 39) and is put to the same use, so that both products are in fact a vegetable juice cocktail.

In the *Smidler* case, Standard Brands made and sold vitamin tablets but used a different trademark thereon. In this case it makes and sells tomato juice and lima beans but uses a different trademark thereon (R. 16). In both cases the trial and appellate courts noted this factual similarity. On this factual foundation, infringement is found in the *Smidler* case and not found in this case. The explanation for the divergence is precisely stated in the *Smidler* case at page 37:

"The gist of this action for infringement of the plaintiff's mark, just as in the related cause of action for unfair competition, is *confusion not as to the kind of product but as to the source of the product.*"

That rule stems from the pancake flour and maple syrup case, *Aunt Jemima Mills Co. v. Rigney*, 247 Fed. 407, 409-410, C. A. 2. It has been followed in other circuits and accepted by Congress and codified in the Trade-Mark Act of 1946, Sec. 32 (1), 15 U. S. C. §1114 (1):

“Any person who shall * * * use, without the consent of the registrant, any * * * colorable imitation of any registered mark in connection with the sale * * * of any goods * * * on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of the origin of such goods * * * shall be liable * * *.”

This language is a sharp departure from the corresponding provision of the Trade-Mark Act of 1905, Sec. 16, 15 U. S. C. §96:

“Any person who shall, without the consent of the owner thereof, * * * colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration * * * and shall use * * * such * * * colorable imitation in commerce * * * shall be liable * * *.”

Judge Veeder who was reversed in the *Aunt Jemima* case, said (234 Fed. 804, 808):

“No one desiring to purchase flour would accept syrup without knowing the difference. That is the test”.

That is the kind of statement that the court below made in this case on January 22, 1949, although the Act of 1946 became effective July 5, 1947:

“It is significant * * * that defendant does not manufacture this product [combination of vegetable juices] and has used its accused mark [VA] only on products [tomato juice, lima beans] which no one would mistake for the combination” (R. 42).

This is a reversion to the view expressed in 1916 by the District Court in the *Aunt Jemima* case.

The contrary view, confusion not as to goods but as to origin of goods, has been applied very generally outside of the Fourth Circuit, was applied in the *Smidler* case and has been codified as statute law in the 1946 Act for the guidance of all federal courts.

The importance of the question of the extent of trade-mark rights with reference to the kind of goods is indicated by Judge Frank's "concurring" opinion in the *Smidler* case, 151 F. (2d) at 37-43. After criticizing the *Aunt Jemima* case on the last page (par. 4), he states at the end that he concurs with his colleagues and adds "I would not, however, be sorry if the Supreme Court reversed our decision". No petition was filed in that case.

It is also indicated by the editorial comment on Judge Frank's opinion in the *Trade-Mark Reporter* for September 1945 under the heading "The extent of a trade-mark owner's rights with reference to the kind of goods" (35 T. M. R. 103, Part I).

II. The Court of Appeals for the Fourth Circuit has decided three important questions under the Trade-Mark Act which have not been, but should be, settled by this Court.

In *Mishawaka Mfg. Co. v. Kresge Co.*, 316 U. S. 203, the reasons for granting certiorari were stated by Mr. Justice Frankfurter as follows (204):

“Deeming the matter to present an important question under the Trade-Mark Act, we brought the case here solely to review the provisions of the decree dealing with the measure of profits and damages for the infringement found by the two lower courts”.

In *Champion Plug Co. v. Sanders*, 331 U. S. 125, another question relating to remedies for trademark infringement was taken up and settled by this Court, namely, the question whether the Trade-Mark Act requires that an accounting be ordered where an injunction will satisfy the equities of the case.

The questions here presented relate to the liability instead of the remedies for infringement, and although this Court has settled many important questions of general application in that connection (such as those relating to generic terms, surnames, abandonment and territorial limitation of trademark rights), the Court has apparently never reviewed certain fundamental rules that are applied as measuring rods by the lower federal courts in determining infringement liability. The measure of such liability in the Court of Appeals for the Fourth Circuit and the district courts of the five states in that circuit should be the same as in the rest of the United States if the Trade-Mark Act is to be effectively enforced with respect to inter-state commerce.

1. In deciding whether the accused mark is a "colorable imitation" of the mark alleged to be infringed, should the court take into consideration the accessories used with the accused mark such as the name of the defendant on the label and the appearance of the label as a whole?

The Court of Appeals found (R. 42):

"* * * the letters VA are customarily used as an abbreviation of the name of the state in which the defendant produces and distributes its goods, and *when used in connection with defendant's name which includes the well known designation of a geographical subdivision of the state, would be understood as indicating the territorial origin of the product* * * *."¹

In so finding the court resorted to the defendant's name, one of the accessories used by the defendant in connection with the accused mark, in order to find that the accused mark conveys a geographical meaning and indicates territorial origin instead of commercial origin.

This was fundamental error. It ignores basic concepts as to what constitutes confusing similarity of trademarks, or in the language of the statute, "colorable imitation of any registered mark" (Act of 1946 §32 (1); 15 U. S. C. §1114), and as to the facts that are relevant to that issue.

The accused mark must stand on its own feet and be sufficiently different in itself from the plaintiff's trademark to avoid confusion. It may not depend upon extraneous matter which may or may not be read and remembered, and which may be changed from time to time. The accessories used on the defendant's label, including the name of the de-

¹ Italics in this brief are ours unless otherwise stated.

fendant, other wording on the label, and the design, colors and general appearance of the label, are not relevant.

N. K. Fairbank Co. v. Luckel, King & Cake Soap Co. (C. A. 9) 102 Fed. 327, 331, 332;

Tillman & Bendel v. California Packing Corp., (C. A. 9) 63 F. (2d) 498, 508, 509;

Rei. Murdoch & Co. v. H. P. Coffee Co., (C. A. 8) 48 F. (2d) 817, 818, 819;

Gehl v. Hebe Co., (C. A. 7) 276 Fed. 271, 272, 273;

Rice-Stix v. Industrial, (C. C. P. A.) 152 F. (2d) 1011, 1012.

The Restatement of Torts, §729, "Factors in Confusing Similarity" significantly omits accessories used with the marks involved.

The finding that the accused mark VA, when used with the defendant's name, indicates territorial origin is a finding that VA has a geographical meaning and therefore is not similar to V-8 in respect of the meaning of the two marks. Geographical meaning enters into this case only in connection with the question of confusing similarity as no question of the validity of the defendant's mark is involved. The elements of confusing similarity are similarities in appearance, sound and meaning and the plaintiff has contended that V-8 and VA are substantially identical in sound, not unlike in appearance, and not different in meaning because each is a symbol without any meaning.

The rule that accessories are irrelevant also applies to the issue of the validity of a trademark, where presented.

In *Standard Brands Inc. v. Smidler* (C. A. 2) 151 F. (2d) 34, *supra*, the court said (36):

“The letter V by itself no more signifies ‘vegetable’ than it does any other word of which it is the initial letter and *it is only when resort is had to other parts of the label* that one may glean that it stands for ‘vegetable’.”

To similar effect is *Grove Laboratories v. Brewer & Co.* (C. A. 1) 103 F. (2d) 175, 179.

With respect to the general appearance of the labels the Court of Appeals found (R. 40):

“The defendant does not display its trade-mark VA in such a way as to lead a purchaser to confuse it with V-8. On this point the District Judge made the following finding which is supported by the evidence:

“There is a marked difference in the appearance of the labels and trade-marks used by the respective parties, including their background, their coloring, and the arrangement of the printed matter thereon. Even the letters, or symbols, V-8 and VA, as printed on the labels, are decidedly unlike both in form and coloring. Neither the defendant’s VA tomato juice label nor its VA lima bean label bears such a resemblance to plaintiff’s V-8 label as would cause the ordinary shopper who might see them on the store shelf to mistake one for the other or to be in any way confused. The difference in appearance is such as to offer no suggestion that the products to which they are attached are from the same source or are put up by the same packer.’ ”

The District Judge decided the case mainly on the basis of the labels instead of the trademarks, much of his discussion being devoted to the "marked difference in the appearance of the labels as a whole" (R. 25, 26, 28, 29).

2. Is there any basis in law or common knowledge for a finding that people familiar with the trademark alleged to be infringed have knowledge of the identity of the owner thereof and would not be confused by the accused mark unless they thought it indicated the goods of a party of that identity?

The Court of Appeals found that the accused mark VA "would be understood as indicating the territorial origin of the product *rather than the goods of a corporation of nation wide fame*" (R. 42). This was in effect a finding that people familiar with V-8 have knowledge of the identity of the owner thereof and would not be confused by VA unless they thought it indicated the goods of a party of that identity.

There is no basis in the record for such a finding or in common knowledge. On the contrary it is a familiar fact that purchasers of trademarked products are not usually interested in the names of the producers. The trademarks serve as a convenient and adequate means of identification. Not only is the identity of the producer frequently unknown but the producer is frequently not interested in making it known. The trademark is substituted for the producer's name and functions more effectively in sales and advertising. In this case the V-8 labels and scrap book of advertisements (Exhibits A, B, F; R. 10, 11, 12) will show, if examined, how little was done to acquaint the public with the name of the producer.

Nor is there any basis in law for such finding or assumption. This was pointed out in an English case which has been frequently cited and followed in our federal courts (*Powell v. Birmingham Vinegar Brew. Co.*, 66 L. J. Ch. 763):

"I think that the fallacy of the appellants' argument rests on this: that it is assumed that one trader cannot be passing off his goods as the manufacture of another unless it be shown that the persons purchasing the goods know of the manufacturer by name, and have in their mind when they purchase the goods that they are made by a particular individual. It seems to me that one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, though they do not know that other by name at all. In the present case, it seems to me that 'Yorkshire Relish' means the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it means a particular manufacture; * * *."

In *Walter Baker & Co. v. Slack* (C. A. 7) 130 Fed. 514, the court said (p. 518):

"We may safely take it for granted that not one in a thousand knowing of or desiring to purchase 'Baker's Cocoa' or 'Baker's Chocolate' know of Walter Baker & Co., Limited."

In *Saalfeld Pub. Co. v. G & C Merriam Co.* (C. A. 6) 238 Fed. 1, the court said (pp. 8, 9):

"Particularly under present-day conditions, the purchasing public may have a fixed purpose to buy a given article and not a substitute therefor, and yet be quite ignorant whether the genuine article is made

by one or another manufacturer. Even under earlier conditions, the purchaser of 'Stone Ale' or 'Camels' Hair Belting' or 'Glenfield Starch' very likely knew as little as he cared about the personal identity of the maker."

In the familiar *Aspirin* case, an action for infringement of a trademark registered under the Act of 1881 (which is on a par with the Act of 1905 under Sec. 46 (b) of the Act of 1946, 15 U. S. C. §1051 note), Judge Learned Hand said (*Bayer Co. v. United Drug Co.*, 272 Fed. 505, 509) :

"So here it might be that the name 'Aspirin' in fact had come at once to describe the drug in question and also its origin from a single source. If it did, that would be enough to justify some protection, since the identity of the source need not be known.
* * * So here the question is whether the buyers merely understood that the word 'Aspirin' meant this kind of drug, or whether it meant that and more than that; i.e., that it came from the same single, though, if one please anonymous, source from which they had got it before."

To similar effect are *Coty v. Le Blume Import Co.* (S.D.N.Y.) 292 Fed. 264, 267, 268; *Shaver v. Heller & Merz Co.* (C.A. 8) 108 Fed. 821, 824; *Dennison Mfg. Co. v. Thomas Mfg. Co.* (Del.) 94 Fed. 651, 656.

This has been Patent Office law since the first trademark case was decided there. *Dawes and Fanning* (1872), 1 Official Gazette 27, 28; *Pro-phy-lac-tic Brush Co. v. Lawson* (1937), 32 U. S. P. Q. 262.

3. Is it significant that the defendant's kind of goods would not be mistaken for the plaintiff's kind of goods in a case where the goods of the parties are related but not identically the same?

The Court of Appeals found (R. 42):

"It is significant * * * that V-8, as used by the plaintiff, has become associated in the public mind with a specific combination of vegetable juices; that defendant does not manufacture this product and has used its accused mark only on products which no one would mistake for the combination; * * *."

The fact that no one would mistake a product packed in a can labelled tomato juice or lima beans for a product packed in a can labelled vegetable juices is of no significance in this case. The question presented is not whether the defendant's kind of goods will be mistaken for the plaintiff's kind of goods (confusion of goods) but whether the defendant's kind of goods are "closely associated" with the plaintiff's kind of goods "in the minds of the purchasers of such products" (par. XI of the complaint, R. 3). The ultimate question as to whether the use of the accused mark of the defendant upon the kind of goods on which it is used "is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods" (Act of 1946 §32 (1), 15 U. S. C. §1114 (1); paragraph XII of the complaint, R. 3) does not depend on confusion of goods but on association of goods.

There are many cases where the goods of the parties are the same kind of goods so that confusion as to source is caused by confusion of goods. For example, in *La Touraine Coffee Co. v. Lorraine Coffee Co.* (C. A. 2) 157 F. (2d) 115, 117, confused purchasers would think that Lorraine Coffee comes from the same source as La Touraine

Coffee because they would think it is La Touraine Coffee. That, however, is not this case. A formula for all cases under the Trade-Mark Act would be that use of a colorable imitation of a registered mark on either the same kind of goods or associated kinds of goods results in confusion as to the source of origin of the goods. The court below correctly stated the law as to the extension of trademark rights to associated goods but failed to apply it (p. 13 *supra*).

Accordingly the case presents the question whether lack of confusion as to the kind of goods is basis for a finding that there is no likelihood of confusion as to the source of the goods under the Trade-Mark Act. This is important and does not appear to have been settled by this Court.

In *Beech-Nut Co. v. Lorillard Co.*, 273 U. S. 629, Mr. Justice Holmes cited two cases on the subject in stating the reasons for granting certiorari (p. 631), but expressed no opinion as to the effect of the differences in the kind of goods (ham, bacon, chewing gum, peanut butter, ginger ale *vs.* chewing tobacco) in view of a concession by the plaintiff (p. 632):

“It may be true that in a case like the plaintiff’s its rights would not be sufficiently protected by an injunction against using the marks upon goods of the same class as those to which the plaintiff now applies it and to which its registration is confined. Upon that we express no opinion. For when it is conceded that whatever its effect the defendant has a right to use ‘Beechnut’ on tobacco unless the right has been abandoned, that possibility does not matter.”

In *Mishawaka Mfg. Co. v. Kresge Co.*, 316 U. S. 203, the goods involved were rubber heeled shoes and detached rubber heels, the plaintiff's trademark having been registered for shoes, but Mr. Justice Frankfurter expressed no opinion as to the materiality of the fact that heels would not be mistaken for shoes because certiorari had been granted "solely to review the provisions of the decree dealing with the measure of profits and damages for the infringement found by the two lower courts" (pp. 204, 205).

Conclusion

The Court of Appeals ended its opinion with the following statement (R. 42):

"Against this factual array the phonetic similarity of the two marks cannot prevail, even if it be supposed, in the absence of any testimony on the point, that the defendant's goods are asked for as VA rather than Virginia tomato juice or lima beans."

The "factual array" is set out in the preceding sentence of the opinion and consists solely of the findings that have already been discussed.

The "phonetic similarity of the two marks" is apparent but the suggestion that defendant's goods may possibly be asked for as Virginia tomato juice or lima beans is not only inconsistent but difficult to understand.

There was no testimony as to the sound of VA when pronounced because all of the facts were stipulated at the suggestion of the defendant in order to save expense, and there is no stipulation on the point because there was and is no question as to what is the fact. VA is a symbol applied to a merchandise label and there can be no doubt as

to how it is pronounced. Defendant would not want it to be pronounced "Virginia" as it would be quite valueless to the defendant in that event. Defendant called it "the trade brand VA" in its answer and also stated that "The VA trade brands" (tomato juice and lima beans) "have become well established with its trade and are a valuable asset of its business" (R. 9). That certainly could not be true if they were so indistinctive as to be pronounced "Virginia".

In addition to the phonetic similarity there is a similarity in appearance between VA and V-8 and no difference in meaning because VA and V-8 are symbols which have no meaning by themselves.

The goods sold under the two marks are not only associated goods but defendant's tomato juice is substantially the same as plaintiff's vegetable juice cocktail from the trademark viewpoint (p. 13 *supra*). It is only the fact that the two products are packed in cans labelled with the respective product names that prevents them from being mistaken for each other.

The petitioners have a strong case on the merits. The decision below is in conflict with a decision in the Second Circuit on the same trademark and presents important questions which have not been but should be settled by this Court.

Respectfully submitted,

ELLIS W. LEAVENWORTH,
Counsel for Petitioners.

